

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION,	No. C 06-06003 CW
Plaintiff,	ORDER FOR FURTHER
v.	FINANCIAL
CHILDREN'S INTERNET INC., et al.,	DOCUMENTATION FROM
Defendants.	DEFENDANT ON
	PLAINTIFF'S MOTION
	FOR CONTEMPT

Plaintiff Securities and Exchange Commission brings this motion for contempt against Defendant Cort L. Poyner on the ground that he has not paid the disgorgement of \$413,767 or the prejudgment interest of \$61,118 as required by the Court's November 3, 2008 Revised Judgment as to Defendant Cort L. Poyner. He has never paid any portion of this amount or demonstrated any efforts to pay. Defendant Poyner opposes the motion on the ground that he is destitute and unable to pay the judgment. The matter was heard on July 9, 2009. Having considered the papers filed by the parties and oral argument on the motion, the Court orders further documentation from Poyner.

PROCEDURAL BACKGROUND

1
2 In September, 2006, Plaintiff filed this case against
3 Defendants The Children's Internet (TCI), Two Dog Net, Inc., Nasser
4 Hamedani, Sholeh A. Hamedani, Peter A. Perez, and Cort L. Poyner,
5 alleging a scheme to sell unregistered TCI shares to investors
6 through material misstatements and omissions. On April 3, 2008, a
7 jury found Poyner liable for violating Sections 5 and 17(a)(1) of
8 the Securities Act of 1933 and for violating Sections 10(b) and
9 15(a)(1) and Rule 10b-5 of the Securities Exchange Act of 1934.
10 Thus, it was apparent as of this early date that some amount of
11 payment from Poyner would be ordered. On August 14, 2008, the
12 Court held a hearing on Plaintiff's motion for equitable and legal
13 remedies against Poyner and on October 3, 2008, the Court issued an
14 Order Determining Remedies for Defendants' Violation of the
15 Securities Laws (Remedies Order) in which it required Poyner to
16 disgorge \$100,875 that he received from commissions from his
17 illegal sale of unregistered TCI shares and \$312,892 in proceeds
18 that he received from selling the shares. Remedies Order at 6-7
19 (Docket # 257). The Court also assessed \$61,118 in prejudgment
20 interest against Poyner. Id. at 8-9. On November 3, 2008, in an
21 amended judgment, the Court ordered Poyner to pay disgorgement of
22 \$413,767 and prejudgment interest thereon in the amount of \$61,118,
23 within ten days after entry of judgment, to the Clerk of the Court.
24 It is undisputed that Poyner has not paid any part of the judgment
25 against him.

26 Meanwhile, on July 25, 2008, the United States Attorney for
27 the Middle District of Florida filed a civil forfeiture action
28 against Poyner, attaching certain real property, personal property

1 and financial accounts owned by Poyner that allegedly contained
2 proceeds from Poyner's fraudulent sale of stock in a company called
3 Edgetech International (Forfeiture Action). Poyner filed an
4 emergency motion to vacate or modify the government's attachment of
5 two trust accounts on the grounds, among others, that the
6 attachment would create severe financial hardship for him. On
7 December 29, 2008, Magistrate Judge Gary R. Jones issued his Report
8 and Recommendation on the Forfeiture. Yun Dec., Ex. 2, (Forfeiture
9 Report) at 15-22. Magistrate Judge Jones was skeptical of Poyner's
10 claim of financial hardship, noting that the government had
11 presented evidence that Poyner had received substantial payments
12 two months before his emergency motion was filed, had not accounted
13 for those payments, lived in a \$2.75 million residence, owned a
14 Bentley, leased a BMW and spent \$30,000 to \$40,000 per month on
15 living expenses. The court noted that Poyner's financial
16 statements indicated that he owned art work worth \$50,000, a
17 vintage guitar collection valued at \$25,000 and furnishings for his
18 5,871 square foot residence. The court also pointed out that, even
19 if Poyner did not have any other source of income, he owned
20 significant assets with which to fund his substantial medical
21 expenses. However, the court explained that it did not need to
22 resolve whether Poyner's current financial situation was as dire as
23 he claimed because he had not established that the funds in the
24 seized accounts were the assets of a legitimate business, a
25 statutory requirement for application of the hardship provision.
26 On April 17, 2009, United States District Judge Kenneth Hodges
27 issued an order adopting the Forfeiture Report as the district
28 court's decision and denying Poyner's emergency motion.

LEGAL STANDARD

A district court has the inherent authority to enforce compliance with its orders through a civil contempt proceeding. International Union, UMWA v. Bagwell, 512 U.S. 821, 827-28 (1994). A contempt sanction is considered civil if it "is remedial, and for the benefit of the complainant." Id. A contempt fine is considered civil and remedial if it either "coerce[s] the defendant into compliance with the court's order, [or] . . . compensate[s] the complainant for losses sustained." United States v. United Mine Workers, 330 U.S. 258, 303-304 (1947).

If a person disobeys a specific and definite court order, he or she may properly be held in contempt. In re Crystal Palace Gambling Hall, Inc., 817 F.2d 1361, 1365 (9th Cir. 1987). A party disobeys a court order when it "fails to take all the reasonable steps within [its] power to insure compliance with the [court's] order." Id. (citation omitted).

In deciding whether to impose a civil contempt sanction, a district court should consider the following factors: the harm from non-compliance; the probable effectiveness of the sanction; the contemnor's financial resources and the burden the sanctions may impose; and the contemnor's willfulness in disregarding the court's order. United Mine Workers, 330 U.S. at 303-304.

The moving party must demonstrate by clear and convincing evidence that the contemnor violated the court's order. In Re Dual-Deck Video Cassette Recorder Antitrust Litig., 10 F.3d 693, 695 (9th Cir. 1993) (citing Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 889 (9th Cir. 1982)); Balla v. Idaho State Bd. of Corrections, 869 F.2d 461, 466 (9th Cir. 1989). The

1 burden then shifts to the respondents to demonstrate that they have
2 performed "all reasonable steps within their power to insure
3 compliance" with the court's orders. Stone v. City and County of
4 San Francisco, 968 F.2d 850, 856 (9th Cir. 1992), cert. denied, 506
5 U.S. 1081 (1993). A party may escape contempt by demonstrating
6 that he or she is unable to comply with the court's order. In re
7 Crystal Palace, 817 F.2d at 1365. In order to prevail on this
8 defense, the alleged contemnor must submit evidence to support it.
9 Combs v. Ryan's Coal Co., Inc., 785 F.2d 970, 984 (11th Cir. 1986)
10 (contemnor's financial statements were inadequate because they were
11 incomplete, unverified, not based on independent audits, and not
12 accompanied by current tax returns).

13 DISCUSSION

14 Plaintiff argues that the failure to disgorge is subject to
15 civil contempt proceedings because the disgorgement order was
16 equitable in nature. See SEC v. Rind, 991 F.2d 1486, 1493 (9th
17 Cir. 1993) (disgorgement is a form of injunctive relief for statute
18 of limitations purposes); SEC v. AMX, Int'l, Inc., 7 F.3d 71, 74-
19 75, n.6 (5th Cir. 1993) (disgorgement order considered to be an
20 injunction in the public interest and, thus, compliance may be
21 compelled though civil contempt proceedings). Poyner does not
22 dispute this.

23 Plaintiff next argues that it has met its burden to show by
24 clear and convincing evidence that Poyner violated the Court's
25 order by not paying the disgorgement amount or the prejudgment
26 interest, or any of it. Plaintiff also argues that the findings in
27 the Forfeiture Report demonstrate that Poyner will be unable to
28 justify his failure to make any payment to the Clerk of the Court.

1 Poyner does not dispute that he has not paid any of the money
2 required by the judgment against him but argues that he should be
3 excused from paying it because he has demonstrated that he is
4 destitute. He also argues that the Forfeiture Report cannot be
5 used as evidence of his present financial situation because
6 collateral estoppel does not apply and his financial situation in
7 2008 has no relationship to his present financial condition.

8 Poyner is correct that the doctrine of collateral estoppel or
9 issue preclusion does not apply here. Collateral estoppel bars the
10 relitigation of issues actually adjudicated in previous litigation
11 between the same parties. Kamilche Co. v. United States, 53 F.3d
12 1059, 1062 (9th Cir. 1995), opinion amended on other grounds, 75
13 F.3d 1391 (1996). Collateral estoppel applies only if an issue was
14 "actually and necessarily determined" in the prior case. Montana
15 v. United States, 440 U.S. 147, 153 (1979). In the Forfeiture
16 Action, although Poyner argued that his financial situation was so
17 dire that the government's attachment of his two trust accounts
18 should be vacated, the court declined to rule on this ground and
19 instead denied Poyner's motion because he had not established that
20 the funds in the accounts were the assets of a legitimate business.
21 Therefore, the issue of Poyner's financial situation was not
22 actually and necessarily determined in the Forfeiture Action and
23 cannot be used to preclude litigation of this issue here.

24 Poyner is also correct that his financial condition in 2008 is
25 not determinative of his current circumstances. However, Poyner
26 has not shown that he is unable to pay the judgment or that he has
27 taken all reasonable steps within his power to insure compliance
28 with it.

1 Poyner has submitted three declarations in support of his
2 argument that he is destitute: the declaration of Susan Wolfe, an
3 attorney who represented Poyner in the Forfeiture Action; the
4 declaration of Alan Lederfeind, former president and Chief
5 Executive Officer of Wall Street Discount Corporation, a registered
6 broker-dealer firm, who was trustee of the two trusts at issue in
7 the Forfeiture Action, Mazel Tuff Trust #1 and Mazel Tuff Trust #2;
8 and the declaration of Poyner himself. In her declaration, Wolfe
9 merely summarizes the proceedings in the Forfeiture Action, as
10 discussed above. In his declaration, Lederfeind discusses the
11 assets and distributions of the two trusts. Mazel Tuff Trust #2
12 held an annuity from the Hartford Financial Service Group from
13 September, 2007 to February, 2008. Lederfeind Dec. at ¶ 4. In his
14 role as trustee, Lederfeind made payments from Mazel Tuff Trust #2
15 of \$15,000 per month for the mortgage on Poyner's house and \$16,000
16 per month to Poyner and Marcie McNeely, allegedly Poyner's former
17 live-in companion, "to help pay their stratospheric living
18 expenses, including expensive dialysis treatments administered to
19 Poyner in his home every other day and payments for very expensive
20 cars." Id. In March, 2008, more than \$2 million

21 was deposited into an account at First Republic Bank in
22 the name of Mazel Tuff Trust #2. The vast majority of
23 that money was still maintained in two Mazel Tuff Trust
24 #2 accounts at First Republic Bank in July, 2008 when
25 Federal law enforcement agents seized it. From those
26 moneys I caused the trust to pay, prior to the seizure, a
27 total of approximately \$90,000 to Mr. Poyner's attorneys
28 Steven Altman and Robinson Brog et al., \$10,000 to a
charitable organization in Miami, and the continuing
mortgage payments for Mr. Poyner's house. The only two
extraordinary payments from the trusts to Mr. Poyner or
his entities during that period were in the amounts of
\$30,000 and \$100,000 which I understood and understand
were needed to cover Mr. Poyner's living expenses.

1 Lederfeind Dec. at ¶ 5. Lederfeind states that he is not aware of
2 any other valuable assets owned or controlled by Poyner. Id. at
3 ¶ 6. Lederfeind states that Mazel Tuff Trust #1 never had more
4 than \$20,000 in assets. Id. at ¶ 5.

5 In his declaration, Poyner states that he has no money and no
6 immediate prospects of making money because, in the Forfeiture
7 Action, the government seized all of his money and most of his
8 financial records, that he is now living on Social Security
9 benefits and food stamps and is receiving Medicaid to pay for his
10 high medical costs due to a recent kidney transplant. Poyner Dec.
11 at ¶ 1. Poyner acknowledges that, until one year ago, he lived a
12 lavish life style in that he owned a \$2.7 million house in Delray
13 Beach, Florida and a Bentley, leased a rare BMW, ate at fancy
14 restaurants and paid lawyers large sums of money to work for him.
15 Id. at ¶ 2. He states that he was

16 able to make large sums of money in the securities
17 industry to support that lifestyle. . . . In early 2007 I
18 paid lawyers to establish two trusts, the Mazel Tuff
19 Trust #1 and the Mazel Tuff Trust #2. I deposited an
20 annuity into one of those trusts and when that annuity
21 expired I was persuaded to liquidate another annuity and
22 deposit its proceeds, totaling more than \$2,000,000, into
23 an account in the name of Mazel Tuff Trust #2
24 [M]oney passed through my hands at a fast pace To
25 take the most obvious example, in February and the spring
26 of 2008 I received some \$800,000 in repayments from a
27 venture called Simply Fit Holdings Group, Inc. in which I
28 participated. I spent some of that money on business
expenses but I also spent some of it to finance my
lifestyle. In July 2008 the Government seized the
account into which I deposited that money.

Id. at ¶¶ 3, 4.

Poyner states that, after the government seized his assets in
the Forfeiture Action, he

submitted a "financial disclosure statement," a copy of
which is annexed hereto as Exhibit D. In it, I disclosed

1 my substantial assets and estimated the "necessary"
2 living expenses that I had been incurring up until the
3 time of the seizure. My estimate of approximately
4 \$35,000 per month was, if anything, an understatement.
5 For example, I did not believe that the cost of the
6 cocaine I desperately needed to feed my addiction should
be disclosed as a "necessary" expense on that form. I
don't spend anything like those amounts now and have not
done so since the seizure. To begin with, I have not
made any mortgage payments on the house since then. . . .
I don't go to fancy restaurants.

7 Id. at ¶ 7. He also states that all his cars have been seized by
8 the government or repossessed for failure to make loan payments and
9 that he has large amounts of credit card debt that he cannot pay.

10 Id. at ¶¶ 7, 8. He states that his medical expenses are high
11 because he needs medical care and expensive prescription drugs as a
12 consequence of the kidney transplant he had last year. Id. at ¶ 9.
13 In the last paragraph of his declaration, Poyner guarantees that "I
14 do not have deposits at bank or brokerage accounts or other assets
15 other than those disclosed herein and do not beneficially own any
16 other assets with which I could pay any part of the disgorgement
17 that the Court has ordered. . . And while I have not given up hope
18 that I will be able to generate income in the future, I do not
19 presently have the means or the connections to do so in the
20 securities markets as I have for so many years in the past." Id.
21 at ¶ 11.

22 As correctly pointed out by Plaintiff, there are serious
23 omissions in Poyner's financial submissions. Although Poyner
24 argues that his 2008 financial situation cannot be used as proof of
25 his current financial condition, the only financial statement he
26 submits is one from 2008 which he submitted in the Forfeiture
27 Action. And, there are many deficiencies in that financial
28 statement: it is unsigned; it fails to disclose any litigation

1 Poyner is involved with, which Plaintiff asserts is done for the
2 purpose of concealing litigation in which Poyner is alleged to have
3 taken millions of dollars; it fails to disclose his sources of
4 income in previous years or to describe how that income was
5 disbursed; it fails to disclose transfers of assets valued at more
6 than \$2,500 in the last three years;¹ it does not include his
7 income tax returns for the past several years; and it is not
8 verified by an independent auditor.

9 Poyner seems to imply that because he receives social security
10 payments, food stamps and medicare, he meets his burden regarding
11 Plaintiff's contempt proceeding. However, he provides no authority
12 that supports this theory. Furthermore, the Wolfe and Lederfeind
13 declarations add nothing to Poyner's argument.

14 In addition, as Plaintiff indicates, Poyner fails to submit
15 financial information for McNeely, his live-in girlfriend for the
16 last ten years. Although Poyner states McNeely is his former
17 girlfriend, Plaintiff submits evidence that indicates that McNeely
18 is still involved with Poyner. Plaintiff filed a February 5, 2008
19 declaration that McNeely submitted in this case, in which she
20 states that she has known Poyner for fourteen years and, for the
21 last ten years, they have resided together and Poyner has provided
22 for her adult son. Supplemental Yun Dec., Ex. 7. In May, 2003,
23 Poyner appointed McNeely as his attorney in fact under a durable
24 power of attorney, id., Ex. 8, in December, 2008, McNeely signed a
25 certified mail receipt, under a power of attorney for Poyner, for
26 papers addressed to Poyner from Plaintiff, id., Ex. 9, and in May,

27
28 ¹Poyner declined to answer item 31 on the financial statement
form which requests the itemization of the transfer of such assets.

1 2009, correspondence regarding Poyner's food stamps from the State
2 of Florida Department of Children and Families was addressed to
3 McNeely, Poyner Dec., Ex. Q. These documents support Plaintiff's
4 theory that Poyner and McNeely are still in a relationship, even if
5 it is only financial in nature, and that Poyner may have
6 transferred cash or other assets to McNeely, especially given that
7 Poyner declined to respond to the question on the 2008 financial
8 disclosure form regarding transfers of assets. A sworn declaration
9 from McNeely addressing these issues would be helpful.

10 However, before the Court finds that Poyner has failed to meet
11 his burden to show he is unable to pay any of the judgment against
12 him and has made all reasonable efforts to do so, the Court will
13 provide him the opportunity to remedy the deficiencies in his
14 financial submissions noted above. To do so, Poyner must submit
15 complete financial statements showing his income, expenses, assets
16 and liabilities from 2007 to the present. These statements must
17 also include Poyner's transfers of assets and tax returns for the
18 last three years. If it is Poyner's position that he is unable to
19 document any aspects of his financial condition because of a
20 seizure of his records, he must submit documents and a declaration
21 verifying his efforts to obtain copies of the records. Poyner must
22 also submit a declaration explaining any reasonable efforts he has
23 made to pay the judgment, such as asking the United States Attorney
24 or the district court involved in the Forfeiture Action to set
25 aside funds from the Mazel Tuff Trusts to pay the judgment, or
26 attempting to sell his art collection, vintage guitars and excess
27 furniture.

CONCLUSION

For the reasons stated above, the Court orders Poyner to submit further financial documentation in support of his opposition to Plaintiff's motion within four weeks from the date of this order. Plaintiff may submit a response within one week thereafter and Poyner may submit a reply one week later. After all the papers have been filed, the Court will set a new hearing date for Plaintiff's motion.

IT IS SO ORDERED.

Dated: 7/20/09



CLAUDIA WILKEN
United States District Judge